CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Brunel University Research Archive

MOHAMED ELEWA BADAR*

THE MENTAL ELEMENT IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY FROM A COMPARATIVE CRIMINAL LAW PERSPECTIVE

For the first time in the sphere of international criminal law, and unlike the Nuremberg and Tokyo Charters or the Statutes of the Yugoslavia and Rwanda Tribunals, Article 30 of the Rome Statute of the International Criminal Court provides a general definition for the mental element required to trigger the criminal responsibility of individuals for serious violations of international humanitarian law. The first paragraph of Article 30 stresses that unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the *ratione materiae* of the International Criminal Court 'only if the material elements are committed with intent and knowledge'. The second paragraph identifies the exact meaning of intent, whereas the third paragraph defines the meaning of knowledge.

At first sight, it appears that the explicit words of Article 30 are sufficient to put an end to a long lasting debate regarding the *mens rea* enigma which has confronted the jurisprudence of the two *ad hoc* Tribunals for the last decade, but this is not true. Scholars disagree regarding the exact meaning of intent under Article 30. Some view Article 30 as encompassing the three categories of *dolus*, namely, *dolus directus* of the first and second degree and *dolus eventualis*. Others hold the opinion that the plain meaning of Article 30 is confined to *dolus directus* of the first degree (intent in *stricto sensu*) and *dolus directus* of the second degree (indirect or oblique intent).

* Lecturer in Law, Brunel Law School, Brunel University, London; Judge, Egyptian Ministry of Justice (2002-2007); Senior Public Prosecutor, Egyptian Ministry of Justice (1997-2002). PhD (Irish Centre for Human–NUI Galway, Ireland); LLM (Irish Centre for Human Rights–NUI Galway, Ireland); Dip. in International Legal Relations (Ain-Shams University, Cairo); LLB & Bachelors of Police Sciences (Cairo). My own thinking on this work has been significantly influenced by Roger Clark's influential paper on *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM L. FORUM 291 (2001). The author would like to thank Prof. William Schabas and Prof. Michael Bohlander for their valuable comments on an early draft of this work. Special thanks for Dr. Nora Karsten of the ICTY and Dr. Noelle Higgins of the Dublin City University for their comments on the final draft. mohamed.badar@brunel.ac.uk

At present, the only guidance given by the International Criminal Court (ICC) regarding the meaning of 'intent and knowledge' as set out in Article 30 is the decision rendered by Pre-Trial Chamber I (PTC I) of 29 January 2007 in the Lubanga case.[1] There, the PTC I asserted that the cumulative reference to 'intent' and 'knowledge' as provided for in Article 30 requires the existence of a volitional element on the part of the accused, and that volitional element encompasses three degrees of *dolus*, namely, *dolus directus* of the first and second degrees and *dolus eventualis*.

This paper examines in depth the elements of culpability as set out in Article 30 from a comparative criminal law perspective as well as the inter-relationship between Article 30 and other provisions of the ICC Statute in light of the Lubanga Decision on the Confirmation of Charges.[2] The comparative study undertaken in this paper is significant since the codification of Article 30 – as with other provisions under the Statute – was conducted by several codifiers who brought their own legal cultural experience to the drafting of this provision.[3] The paper concludes with some suggestions regarding the *mens rea* standards which are deemed appropriate to trigger the criminal responsibility of individuals for serious violations of international humanitarian law.

[1] *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-803, Décision sur la confirmation des charges, (*Lubanga* Décision sur la confirmation des charges), 29 January 2007.
[2] Ibid.
[3] For the drafting history of Article 30 of the ICC Statute see Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM L. FORUM 291 (2001).

1. ANATOMY OF ARTICLE 30 OF THE ICC STATUTE

Elements Analysis – Mental Elements and their Objects

In order to hold a person criminally responsible and liable for a crime within the jurisdiction of the ICC, it must be established that the material elements of the offence were committed with intent and knowledge. This is expressly mentioned in paragraph 1 of Article 30 of the ICC Statute:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.[4]

It is clear that the ICC Statute lacks a general provision regarding the definition of the *actus reus* or the material elements of the crime, and yet leaves the door open with respect to what should be understood by the phrase 'material elements' as it appears in Article 30(1). This deficiency, however, is remedied by paragraphs (2) and (3) of the same Article which set out the relationship between the mental elements and the material elements of an offence – expressly referred to as conduct, consequence and circumstance.[5] In so doing, Article 30 sets itself aside from the broad notion of 'materials elements' as presented in the Model Penal Code or German literature.[6] The significance of this provision is that it assigns different levels of mental element to each of the material elements of the crime in question. This is a remarkable shift from

---

[4] Rome Statute, Article 30. *Contra* see Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6 *JICJ* 471 (2008) at 482.

[5] See Erkin Gadirov and Roger Clark, *Article 9 – Elements of Crimes*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 505-529 (Otto Triffterer, ed., 2nd edn., 2008) at 513. As a result of the omission of the earlier draft of then Article 28 on *actus reus* 'causation' can hardly be seen as a requisite material element in the Statute (*ibid*). For more details on the element of causation *see ibid* at 521-522. See also Otto Triffterer, *Causality, as a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute*?, 15 *LJIL* 179 (2002). See also Donald k. Piragoff and Darryl Robinson, *Article 30 – Mental Element*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 849 (Otto Triffterer, ed., 2nd edn., 2008) at 851-852.

[6] Section 1.13(10) of the Model Penal Code. For more information on the Model Penal Code, *see* Herbert Wechsler, *Codification of the Criminal Law in the United States: The Model Penal Code*, 68 COLUM L. REV. 1425 (1968); Herbert Wechsler, *The Challenge of A Model Penal Code*, 65 HARV. L. REV. 1097 (1952). See also Jerome Hall, *The Proposal to Prepare a Model Penal Code*, 4 JOURNAL OF LEGAL STUDIES 91 (1951-1952). For the recent work by the American Law Institute on the MPC, *see* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, (The American Law Institute, 1985). As for the definition of material elements in the German literature particularly, what so called the theory on negative legal elements of the offence or '*Lehre von den negativen Tatbestandsmerkmalen*', *see* VOLKER KREY, *Deutsches Strafrecht Allgemeiner Teil*, Vol. 2, (2003) at 15, 17.

an 'offence analysis' approach to an 'element analysis' approach.[7] Under 'offence analysis', crimes are defined in general terms; intentional crimes, reckless crimes and negligent crimes, whereas 'element analysis' in contrast, recognizes that a single crime definition may require a different culpable state of mind for each objective element of the offence. This approach is similar to the one adopted by the Model Penal Code, in 1962, by the American Law Institute.[8] The Model Penal Code's approach is based on the view that, unless some element of mental culpability is proved with respect to each material element of the offence, no valid criminal conviction may be obtained.[9] This is explicitly stated in § 2.02(4) of the Model Penal Code (MPC) which is entitled 'prescribed culpability requirement applies to all material elements'. Section 2.02(4) of the MPC reads as follows: 'When the law defining an offence prescribes the kind of culpability that is sufficient for the commission of an offence, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offence, unless a contrary purpose plainly appears.'[10]

Under the ICC Statute, 'element analysis', or the 'rule of *mens rea* coverage', has to be applied cautiously since culpability terms (a) are defined in Article 30; (b) are stated in the definition of particular crimes (genocide 'with intent to', war crimes of 'wilful killing') or; (c) are stated in the Elements of Crimes.[11]

Different Culpability Terms Defined in Relation to Each Objective Element

Article 30 of the ICC Statute – the default rule – assigns different levels of culpability to each of the material elements of the crimes under the subject matter jurisdiction of the Court. Unless otherwise provided, a person has intent in relation to conduct if 'that

[7] Kelt and von Hebel used the phrase 'material elements and the principle of mens rea coverage' instead of 'element analysis', see Maria Kelt and Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 19-40 (Roy Lee ed., 2001).

[8] See the AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, Vol. 1, (The American Law Institute, 1985). It is worth pointing out that within United States there are fifty-two American criminal codes, and it is often difficult to state 'the American rule on any point of criminal law'.

[9] *Model Penal Code and Commentaries*, § 2.02, *supra* note 6, at 229, n. 1.

[10] Model Penal Code, § 2.02(4).

[11] Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record (adopted by the Assembly of States Parties on September 9, 2002).

person means to engage in the conduct'.[12] According to the same provision, a person is said to have intended a consequence not only if 'that person means to cause that consequence' but also if he 'is aware that it will occur in the ordinary course of events'.[13] Surprisingly, Article 30 assigns two different culpable states of mind for the consequence element, namely intent and knowledge. Either of these culpable mental states is sufficient to cover the consequence element. Yet, a person who intentionally engages in a proscribed conduct with *awareness* that a consequence will occur in the ordinary course of events may incur criminal liability for any of the crimes within the *ratione materiae* of the Court (unless otherwise provided). Yet, one might argue that *dolus directus* of second degree or oblique intent is sufficient *mens rea* to trigger the criminal responsibility of individuals for serious violations of international humanitarian law under the ICC Statute.

As for the circumstance element – a material element which is related to the knowledge or awareness of a defendant and not to his intention – the ICC Statute required a culpable state of knowledge (knowing standards). This means the defendant's awareness of the existence of a circumstance.[14]

Thus, the general rule under Article 30 is the full coverage of the material elements by the corresponding mental elements. Problems may arise regarding special types of material elements (I will name them quasi-material elements) which do not fall under the three categories of the materials elements mentioned above and accordingly may not be covered by the default rule of Article 30 – intent and/or knowledge. There are three different types of these quasi-material elements. The first type is the quasi-material element of a 'legal character'. For instance, Article 8(2)(a) of the ICC Statute requires that a victim be a protected person under the Geneva Conventions of 1949. According to some commentators the default rule of Article 30 does not apply to such *factual* elements since this provision 'does not require proof that the accused knew the relevant law or that he or she correctly completed such a legal evaluation.'[15] Yet, one might argue that Article 32(2) has no role to play in such situations. It is not clear, however, whether this is considered a mistake of law, or a

[12] Rome Statute, Article 30(2)(a).
[13] Rome Statute, Article 30(2)(b).
[14] Rome Statute, Article 30(3).
[15] Piragoff and Robinson, *Article 30 – Mental Element*, *supra* note 5, at 852-853.

mistake of fact or a combination of both – mistake of mixed fact and law.[16] This issue will be examined later in detail when we discuss the relationship between Articles 30 and 32 of the ICC Statute.

The second type of quasi-material element involves a normative aspect or a value judgment.[17] The requirement of '*serious* injury to body' as provided for in Article 7(1)(k) – crimes against humanity of other inhuman acts – and Article 8(2)(a)(iii) – grave breaches of the Geneva Conventions of wilfully causing great suffering, or serious injury to body or health – is an example of a quasi-material element which involve a value judgment . In such case, the prosecution is not entitled to demonstrate that the accused 'correctly completed a normative evaluation.'[18] Otherwise, the accused's subjective opinion would be the sole determinative factor in finding whether a crime had been committed.[19]

The third category includes circumstantial elements; the widespread or systematic attack for crimes against humanity and the existence of an armed conflict for war crimes. This type of element was referred to during the negotiations of the Elements of Crimes as 'contextual elements'.[20] If this element is to be considered material element, it should as a rule – element analysis – be covered by a corresponding mental element. There is a consensus among scholars that such contextual element is related to the broader context that renders the crime an international crime, and accordingly the default rule – intent and knowledge – does not apply to them.[21]

---

[16] See the very recent and challenging discussion on the subject by Kevin Jon Heller, *Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute, A Critical* Analysis, 6 *JICJ* 419 (2008).
[17] Piragoff and Robinson, *Article 30 – Mental Element*, *supra* note 5, at 852-853.
[18] Ibid, at 853.
[19] Ibid.
[20] Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record (adopted by the Assembly of States Parties on September 9, 2002).
[21] Piragoff and Robinson, *Article 30 – Mental Element*, *supra* note 5, at 853. Maria Kelt and Herman von Hebel, *What Are the Elements of Crimes?*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 13-18 (Roy Lee ed., 2001): 'there was considerable debate [during the negotiations of the elements of crimes] as to whether they [the contextual elements] really were "material elements" – and if so whether they were (fully) covered by the mental element of article 30 – or whether they formed a separate type of element. Some participants thought, for example, that there might be a category of elements that are neither material nor mental, but which should be considered "jurisdictional" or "merely jurisdictional". Ultimately, however, an explicit decision as to whether these elements were "material elements" became unnecessary, as for each contextual element some corresponding mental element [however, lower than that provided for under Article 30] was specified in most cases, which, as a result, […] rendered the other question moot'.

2. DIFFERENT DEGREES OF MENTAL ELEMENTS UNDER ARTICLE 30

Article 30 is in line with the Latin maxim *actus non facit reum nisi mens sit rea*. This provision, however, goes further, assuring that the mental element consists of two components: a volitional component of intent and a cognitive component of knowledge. In so doing, Article 30 confirms the evolutionary developments of the law of *mens rea* under the jurisprudence of the *ad hoc* Tribunals which demand that, for the imposition of criminal responsibility for serious violations of international humanitarian law, both a cognitive and volitional component must be incorporated into the legal standard.[22]

The Meaning of Intent

Generally speaking, in criminal law the word 'intent' or the adjective 'intentionally' have traditionally not been limited to the narrow definition of purpose, aim, or design. According to common law tradition, a person is considered to intend the consequence not only if (i) his conscious objective is to cause that consequence, but also (ii) if he acts with knowledge that the consequence is virtually certain to occur as a result of his conduct.[23] The term 'intent' as set out in Article 30 has two different meanings, depending upon whether the material element related to conduct or consequence. A person has intent in relation to conduct, if he 'means to engage in the conduct',[24] whereas in relation to consequence, a person is said to have intent if 'that person means to cause that consequence' or 'is aware that it will occur in the ordinary course of events'.[25]

Intent in Relation to Conduct

Pursuant to Article 30(2)(a) of the ICC Statute, a person is said to have intent in relation to conduct if that person means to engage in the conduct. This definition has

[22] See *Prosecutor v. Tihomir Blaškić*, (Case No. IT-95-14-A) Judgment, July 29, 2004, para 41. See also *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Trial Judgment, 30 June 2006 (*Orić* Trial Judgment), para. 279.
[23] See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, (3rd edn., 2001) at 119; See also GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART, §§ 16, 18 (2nd edn., 1961).
[24] Rome Statute, Article 30(2)(a).
[25] Rome Statute, Article 30(2)(b).

two aspects. First, the relationship between intent and conduct as set out in Article 30(2)(a), 'seems closer to what common lawyers often think of the "volitional" part of an "act" (deliberately pulling a trigger as opposed to a reflex action, for example).'[26] Yet, 'the conduct must be the result of a voluntary action on the part of the perpetrator.'[27] Professor Roger Clark, however, noted that knowledge is not defined in relation to conduct and this 'may create some mischief later.'[28] It is submitted that unless relevant circumstances are known that qualify the action as illegal it cannot be said that the person intends the conduct.[29] Generally, the prosecution must prove that the defendant had knowledge of facts which would make the conduct illegal, but ordinarily is not required to prove the defendant's awareness of the legal consequences of the conduct (e.g. that the conduct was illegal).[30]

Second, with regard to conduct, the drafting history of the Rome Statute shows that there was a strong will to include within the Statute an article defining conduct as an act or omission.[31] The Draft Statute prepared by the Preparatory Committee in 1996 included a provision headed '*Actus reus'* (act and/ or omission)[32] which was modified at the February 1997 session and submitted to the Rome Conference.[33] The term 'conduct' was defined under then Article 28 to 'constitute either an act or an omission, or a combination thereof'. The Rome Conference had difficulty reaching agreement on the circumstances in which a person can incur criminal responsibility for an omission. As a consequence, the entire provision was deleted from the Statute 'with the understanding that the question of when and if omissions might constitute or be equivalent to conduct would have to be resolved in future by the Court.'[34]

---

[26] Clark, *The Mental Element in International Criminal Law*, *supra* note 3, at 303, n. 38.
[27] As suggested by Piragoff and Robinson, *Article 30 – Mental Element*, *supra* note 5, at 859; Gerhard Werle and Florian Jessberger, '*Unless Otherwise Provided*' *– Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law*, 3 *JICJ* 35 (2005) at 41; Albin Eser, *Mental Elements*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese *et al*. eds., 2001) at 913.
[28] Roger Clark, *The Mental Element in International Criminal Law*, *supra* note 3, at 303, n. 39.
[29] Piragoff and Robinson, *Article 30 – Mental Element*, *supra* note 5, at 859
[30] *United States v. Hilliard*, 31 F.3d 1509 (10th Cir. 1994).
[31] See Michael Duttwiller, *Liability for Omission in International Criminal Law*, 6 *ICLR* 1 (2006) at 56-58.
[32] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *(Proceedings of the Preparatory Committee During March-April and August 1996)*, U.N. GAOR 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) Vol. I, p. 45, and Vol. II, at 90.
[33] Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 53rd Sess., U.N. Doc. A/AC.249/1998/CRP.7 (1998), pp. 64-65 (article) 28.
[34] Piragoff and Robinson, *Article 30 – Mental Element*, *supra* note 5, at 858-859.

Professor Albin Eser holds the view that conduct, as laid down in paragraph 2(a) of Article 30, is only limited to positive action. According to Eser, cases of omissions within the Statute are not covered by the default rule of Article 30 (intent and knowledge), 'but would rather need special regulation according to the opening words of paragraph 1 (unless otherwise provided)'.[35] Other commentators noted that

> the very definitions of most of the crimes under the *Rome Statute* explicitly provide that they can be committed only by an act. Yet, there are some that can be said to provide room for such interpretation that encompasses omissions as well. Thus, such crime as wilful killing (article 8 para. 2(a)(i)) is capable of being interpreted in such way that includes faults of omission too. In that case it would cover, for instance, failure to feed prisoners of war or to provide medical care to wounded persons or to rescue shipwrecked persons belonging to a hostile armed forces.[36]

A recent decision, rendered by the ICC PTC I expressly referred to Article 30 as covering acts or omissions.[37] In addition, the practice of the Yugoslavia and Rwanda Tribunals is consistent that 'committing', as set out in Articles 7(1)/6(1) of the ICTY/ICTR Statutes, respectively, 'covers physically perpetrating a crime or engendering a *culpable omission* in violation of criminal law'.[38]

---

[35] Eser, *Mental Elements*, *supra* note 27, at 912; See also Piragoff and Robinson, *Article 30 – Mental Element*, *supra* note 5, at 859.

[36] Gadirov and Clark, *Article 9 – Elements of Crimes*, *supra* note 5, at 515.

[37] Lubanga Décision sur la confirmation des charges, *supra* note 1, paras. 351-355. In the present case, Pre-Trial Chamber I employed the phrase 'omissions' eight times while discussing Article 30 of the ICC Statute.

[38] Judgment, *Limaj* (IT-03-66-T), Trial Chamber, 30 November 2005, § 509 (emphasis added); Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, § 188; Judgment, *Kunarać* (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, § 390; Judgment, *Gacumbitsi* (ICTR-2001-64-T, Trial Judgment, 17 June 2004, § 285 ("Committing" refers generally to the direct and physical perpetration of the crime by the offender himself"); Judgment, *Kayishema* (ICTR-95-1-A), Appeals Chamber, 1 June2001, § 187; Judgment, *Vasiljević* (IT-98-32-T), Trial Chamber, 29 Nov. 2002, § 62 ('The Accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where is it is proved the he personally physically perpetrated the criminal acts in question or personally omitted to do something in violation of international humanitarian law'); Judgment, *Kamuhanda* (ICTR-99-54A-T), Trial Chamber, § 595 ('To commit a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law.'); See also Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 188; Judgment, *Kunarac* (IT-96-23-T & IT-9623/1-T), Trial Chamber, 22 February 2001, § 390; Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, § 601; Judgment, *Krnojelac* (IT-97-25-T), Trial Chamber, 15 March 2002, § 73. Judgment, *Blagoje Simić* (IT-95-9-T) Trial Chamber, 17 October 2003, § 137 ('Any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with requisite knowledge.').

Intent in Relation to Consequence – the First Alternative of Intent

Pursuant to Article 30(2)(b) of the ICC Statute, a person has intent in relation to consequence if he (i) 'means to cause that consequence' or (ii) 'is aware that it will occur in the ordinary course of events.' Thus, Article 30(2)(b) assigned two different degrees of intent in relation to the consequence element, namely direct intent or *dolus directus* of first degree and indirect intent or *dolus directus* of second degree. The issue whether *dolus eventualis* or subjective recklessness is sufficient to fall within the ambit of Article 30 is highly debatable and is subject to a detailed examination below.

These culpable mental states have to be assessed subjectively and not objectively, meaning that the prosecution must demonstrate that the perpetrator himself, and not a reasonable person in the same situation, was aware of the occurrence of the consequence in question. From a comparative criminal law perspective, the first degree of intent (direct intent/*dolus directus* of first degree) denotes the state of mind of a person who not only foresees but also wills the occurrence of a consequence. This is the actual meaning of intent in common law jurisdictions.

It is also equivalent to the Model Penal Code culpability term 'purposely'. Section 2.02 of the Model Penal Code considers a person acts 'purposely' with regard to a result if it is his conscious object to cause such result.[39] In *United States v. Bailey et al.*, the Supreme Court ruled that a 'person who causes a particular result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct.'[40] *Absicht*, or *dolus directus* of first degree, in German criminal law, is also identical to 'direct intent' as defined in Article 30(2)(b) of the ICC Statute. '*Absicht*' is defined as a 'purpose bound will'.[41] In this type of intent, the actor's will is directed finally towards the accomplishment of that result.[42]

[39] Model Penal Code, § 2.02(2)(a)(i).
[40] *United States v. Bailey et al*., 444 U.S. 394; 100 S. Ct. 624; 62 L. Ed. 2d 575; U.S. Lexis 69, November 7, 1979, Argued, January 21, 1980, Decided, at 632; See also *United States v. United States Gypsum Co*., 438 U.S. 422, 445 (1978).
[41] KREY, DEUTSCHES STRAFRECHT: ALLGEMEINER TEIL, *supra* note 6, at 109.
[42] Cramer, in STRAFGESETZBUCH: KOMMENTAR, (Schönke and Schröder eds., 1997) at 263. (*Absicht ... liegt nur dann vor, wenn der Handlungswille des Täters final gerade auf den vom Gesetz bezeichneten Handlungserfolg gerichtet war*); LACKNER, *Strafgesetzbuch,* (München: Beck, 1991) 95. For more details on *Vorsatz* in German criminal law in the English language *see* Mohamed Elewa Badar, *Mens Rea – Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*, 5 *ICLR* 203 (2005).

In the Lubanga case,[43] the first test ever of Article 30, PTC I of the ICC asserted that the reference to 'intention' and 'knowledge' in a conjunctive way requires the existence of a 'volitional element' on the part of the suspect.[44] This 'volitional element' refers first to situations in which the suspect (i) knows that his acts or omissions will materialize the material elements of the crime at issue; and (ii) he undertakes these acts or omissions with the concrete intention to bring about the material elements of the crime. According to the PTC I, the above-mentioned scenario requires that the suspect possesses a level of intent which it called *dolus directus* of the first degree.[45]

It is worth stressing that 'direct intent', as defined in Article 30(2)(b) of the ICC Statute, is not identical to the 'special intent' required for particular crimes which in their definitions include the following terms: 'with intent to',[46] 'with the intent of affecting',[47] and 'with the intention of'.[48] The 'special intent' or *dolus specialis* required for these categories of crimes has no material element (consequence or result element) to cover, since the accomplishment of this consequence is not an ingredient element of the crime at issue.[49]

Intent in Relation to Consequence – the Second Alternative of Intent

Article 30(2)(b) of the ICC Statute assigns a second alternative of intent with regard to the consequence element, providing that even if the perpetrator does not intend the proscribed result to occur, he is considered to intend that result if he 'is aware that [the consequence] will occur in the ordinary course of events'. In the Lubanga case the PTC I asserted that Article 30 encompasses other aspects of *dolus*, namely *dolus directus* of the second degree.[50] This type of *dolus* arises in situations in which the

[43] *Lubanga* Décision sur la confirmation des charges, *supra* note 1.
[44] Ibid., para. 351.
[45] Ibid.
[46] Rome Statute, Chapeau element of Article 6: '… genocide means any of the following acts committed *with intent to* destroy …'
[47] Rome Statute, Article 7(2)(f): '"Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with intent of affecting the ethnic composition of any population …'
[48] Rome Statute, Article 7(2)(h): '"Enforced disappearance of persons" means the arrest, detention or abduction … with the intention of removing them from the protection of the law for a prolonged period of time.'
[49] See Mohamed Elewa Badar, *Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 6 *ICLR* 313 (2006) at 317-328.
[50] *Lubanga* Décision sur la confirmation des charges, *supra* note 1, para. 352.

suspect, without having the actual intent to bring about the material elements of the crime at issue, is aware that such elements will be the necessary outcome of his actions or omissions.[51] Yet, there are three important aspects of this second alternative of intent.

First, this degree of *mens rea* is akin to 'knowledge' or 'awareness' rather than 'intent *stricto sensu*'. This position is supported by the definition given to 'knowledge' in paragraph 3 of Article 30, '[f]or the purpose of this article, "knowledge" means awareness that … a consequence will occur in the ordinary course of events.' The essence of the narrow distinction between acting intentionally and knowingly with regard to the consequence element is the presence or absence of a positive desire or purpose to cause that consequence. The plain meaning of Article 30(2) makes it clear that once the prosecution demonstrates that an accused, in carrying out his conduct, was aware that the proscribed consequence will occur, unless extraordinary circumstances intervened, he is said to have intended that consequence. Thus, a soldier who aims to destroy a building, while not wishing to kill civilians whom he knows are in the building, is said to intend the killing of the civilians (Article 8(2)(a)(i) of the ICC Statute) if the building is in fact destroyed and the civilians are killed.[52]

Secondly, the phrase 'aware that it will occur in the ordinary course of events' is subject to different interpretations. Does it require that the perpetrator foresees the occurrence of the consequence as certain? Or whether mere awareness of the probable occurrence of the consequence is sufficient? Professor Triffterer has suggested that since Article 30(2)(b) explicitly states 'will occur' and not 'might occur', it would not be enough to prove that the perpetrator is aware of the *probability* of the consequence and nevertheless carrying out the conduct which results in the proscribed consequence.[53] Rather, the prosecution must demonstrate that the perpetrator foresees the consequence of his conduct as being *certain* unless extraordinary circumstances intervene.[54] Interestingly, this second alternative of intent is identical to the Model Penal Code culpability term 'knowingly'. Pursuant to § 2.02(2)(b)(ii) of the Model

[51] Ibid.
[52] As suggested by Werle and Jessberger, *Unless Otherwise Provided*, *surpa* note 27, at n. 34.
[53] See Otto Triffterer, *The New International Criminal Law – Its General Principles Establishing Individual Criminal Responsibility*, in THE NEW INTERNATIONAL CRIMINAL LAW, 639-727 (Kalliopi Koufa ed., 2003) at 706.
[54] Eser, *Mental Elements*, *supra* note 27, at 915: "… the perpetrators being aware that the action will result in the prohibited consequence … with certainty…"

Penal Code, a person acts knowingly with respect to a result if it is not his conscious objective, yet he is *practically certain* that his conduct will cause that result.[55]

It is also equivalent to the common law concept of 'oblique intent', which extends the meaning of intention to encompass foresight of a certainty.[56] Professor Glanville Williams, who devoted special attention to the notion of 'oblique intention,' argued that the law should generally be the same where the defendant is aware that a consequence in the future is the certain result of what he does, though he does not intend or desire its occurrence.[57] In cases of oblique intention, there are twin consequences of the conduct, *x* and *y*; the actor wants *x* and is prepared to accept its unwanted twin *y*.[58] Oblique intent, in the words of Glanville Williams, is 'a kind of knowledge or realization.'[59] In *Regina v. Buzzanga and Durocher*, a case concerned with promoting hatred against the French Canadian public in Essex County, the Ontario Court of Appeal adopted William's notion of 'foresight of certainty' as a second alternative of intent:

> as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he decided to bring it about (albeit regretfully) in order to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective.[60]

It also resembles the German concept of *dolus directus* of the second degree in which the cognitive element (knowledge or awareness) dominates, whereas the volitional element is too weak. As the German Federal Supreme Court of Justice (*Bundesgerichtshof-BGH*) put it more clearly, a perpetrator who foresees a consequence of his conduct as certain is considered to act *wilfully* with regard to this

---

[55] Model Penal Code, § 2.02(2)(b)(ii).
[56] For a thorough analysis of the notion of 'oblique intent' in the criminal law of England see Glanville Williams, *Oblique Intention*, 46 CAMBRIDGE LAW JOURNAL (1987) 417.
[57] Ibid., at 420.
[58] Ibid.
[59] Ibid.
[60] *Buzzanga* (1979) 49 C.C.C. (2d) 369 (Ont.C.A), per Justice Martin, quoted in DON STUART, CANADIAN CRIMINAL LAW: A TREATISE (2001) at 218-219. The relevant facts of the case as summarised by Stuart were as follows: The accused had been convicted … of wilfully promoting hatred against the French Canadian public in Essex County. They had circulated an inflammatory handbill entitled 'Wake Up Canadians Your Future is At Stake'. The two accused, who identified with French Canadian aspirations and culture, denied intent to promote hatred. They were involved with a movement to establish a French language high school in Essex County. Their purpose was to dramatise how ridiculous the opposition had been and to prompt the government into quick intervention.

consequence, even if he regrets its occurrence.[61] Professor Albin Eser's thoughtful explanation as to the nature and meaning of the phrase 'aware that it will occur in the ordinary course of events' merits lengthy quotation:

> Whatever may be meant by 'ordinary course of events', with regard to the awareness thereof this clause is obviously meant to cover *dolus directus in the second degree* in which the volitional component of intention seems to be substituted by the cognitive component in terms of the perpetrators being aware that the action will result in the prohibited consequence (though not desired) with certainty, as in the case of bombing a building inhabited by members of a persecuted ethnical group where some of them will unavoidably be killed, with the further inevitable consequence of destroying parts of this group. If in this case the genocidal act is considered as 'intentional' although the bomb planter may not have desired to kill any people or does not personally support the ethnical cleansing intentions of his superiors, this conclusion can be supported by attributional as well as evidentiary arguments: with regard to attributing consequences to the causer, it does not matter whether he was directly aiming at them or whether he, in pursuing a different goal, was prepared to let the prohibited result occur, thus using it as means to another end, as in the case where it is the military commander's first priority to destroy the building for strategic reasons while knowing with certainty that this goal could not be reached without killing innocent inhabitants. And from an evidentiary point of view, one could argue that, in acting though aware of the prohibited consequences, the perpetrator was indeed willing to accept them. This position is at least feasible so long as the perpetrator assumes that the prohibited consequences 'will' occur, as required by sub-paragraph (b).[62]

While some legal scholars view the second alternative of intent as excluding concepts of *dolus eventualis* or recklessness,[63] others advocate the inclusion of recklessness and *dolus eventualis* in the legal standard of Article 30.[64] As far as the drafting history

---

[61] *BGHSt* 21, 283 (vol. 21, at 283).
[62] Eser, *Mental Elements*, *supra* note 27, at 914-915.
[63] Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 *EJIL* 158 (1999), at 153: 'While it is no doubt meritorious to have defined these two notions [intent and knowledge in Article 30], it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute.'; Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW 57-149 (2004), at 64-5: 'Antonio Cassese has criticized the ICC Statute for not recognizing "recklessness" as the basis of liability for war crimes. However, if one takes into account the resolve to confine the jurisdiction of the ICC to "the most serious crimes of concern to the international community as a whole," it is reasonable to accept that crimes committed without the highest degree of *dolus* ought as a general rule not to be prosecuted in the ICC.'; Werle and Jessberger, *Unless Otherwise Provided*, *supra* note 27, at 41-42: 'This interpretation of Article 30(2)(b) and 3 ICCSt., which appears to be shared by most commentators, results in the establishment of a standard of mens rea apparently stricter than that usually applied by both domestic and international courts.'
[64] Piragoff and Robinson, *Article 30 – Mental Element*, *supra* note 5, at 533-4; Hans H. H. Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 *JICJ* 38-55 (2004), at 45. Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, 1 *JICJ* 26-38 (2003), at 32: '… the ICC

is concerned, Professor Roger Clark noted that '*dolus eventualis* fell out of the written discourse before Rome. Recklessness, in the sense of subjectively taking a risk to which the actor's mind has been directed, was ultimately to vanish also from the Statute at Rome, with again only an implicit decision as to whether it was appropriate for assessing responsibility.'[65] Before going further to examine whether recklessness and *dolus eventualis* fall under the realm of Article 30 of the ICC Statute it is desirable to discuss the meaning of these concepts under common and civil legal systems.

Recklessness in Common Law Systems

The law of England, as it currently stands, defines recklessness as the conscious taking of an unjustifiable risk. The term 'recklessly' is used to denote the subjective sate of mind of a person who foresees that his conduct may cause the prohibited result but nevertheless takes a deliberate and unjustifiable risk of bringing it about.[66] A modern Canadian writer, Don Stuart, asserted that the proper test to be followed in such situations is to examine whether D, given his shortcomings and strengths, foresaw the consequence or circumstance. He concluded that whether D 'ought', 'could' or 'should' – as a reasonable person – have thought about the occurrence of the consequence or the existence of such circumstances is not the right test to be applied.[67] In *Sansregret v. The Queen*,[68] a case before the Supreme Court of Canada, the subjective approach for recklessness was authoritatively asserted as follows:

> In accordance with well established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is in other words, the conduct of one who sees the risk and

---

Statute's provision on the mental element (Article 30) appears to limit itself to intent (dolus) alone, thereby excluding negligence (culpa). Using ambiguous and psychologically imprecise wording … It … does include intent and recklessness (*dolus eventualis*) …'; Werle and Jessberger, 'Unless Otherwise Provided', *supra* note 27, at 53: 'the requirments of the perpetrator's being aware that the consequence will occur in the ordinary course of events or of the perpetrator's meaning to cause that consequence (Article 30(2)(b) ICCSt.) excludes both forms of subjective accountability. It thus follows from the wording of Article 30(2)(b) that recklessness and *dolus eventualis* do not meet the requirement.'

[65] Clark, *The Mental Element in International Criminal Law*, *supra* note 3, at 301.

[66] See *R. v. G and Another* [2004] 1 AC 1034 (HL).

[67] DON STUART, CANADIAN CRIMINAL LAW, A TREATISE, *supra* note 60, at 224.

[68] *Sansregret v. The Queen*, [1985] 45 C.R. (3d) 193, 203-04 (S.C.C.)

> who take the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.[69]

The term recklessness, as used in the Model Penal Code, involves conscious risk creation, an element which differentiates it from acting either purposely or knowingly. It is a state of mind distinct from intent.[70] The Code provides that a person acts 'recklessly' if (1) he 'consciously disregards a substantial and unjustified risk that the material element exits or will result from his conduct.'[71] According to the Code, a risk is 'substantial and unjustifiable' if 'considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.'[72] In *United States v. Albers*,[73] it was held that a finding of recklessness may only be made when persons disregard a risk of harm of which they are aware.[74] The requirement that the actor consciously disregard the risk is the most significant part of the definition of recklessness. It is this concept which differentiates a reckless actor from a negligent one.[75]

Dolus Eventualis in Romano-Germanic Law Systems

Dolus eventualis is a well known concept in most of the Romano-Germanic legal systems. This type of *dolus* is recognized under the Italian criminal law as *dolo eventuale*. Pursuant to Article 43 of the Italian *Codice Penale*, all serious crimes require proof of the mental element known as *dolo*, which means that the prohibited result must be both *preveduto* (foreseen) and *voluto* (wanted/willed). According to the Italian criminal law, a result may be *voluto* even though it is not desired, if, having contemplated the possibility of bringing it about by pursuing a course of conduct, the perpetrator is prepared to run the risk of doing so *dolo eventuale*. Even a small risk

[69] *Sansregret v. The Queen*, [1985] 45 C.R. (3d) 193, 203-04 (S.C.C.)
[70] *U.S. v. Trinidad-Aquino*, 259 F.3d at 1146.
[71] Model Penal Code, § 2.02(2)(c).
[72] Model Penal Code, § 2.02(2)(c).
[73] *United States v. Albers*, 226 F. 3d 989, 995 (9th Cir. 2000).
[74] *United States. v. Albers*, 226 F. 3d 989, 995 (9th Cir. 2000), *citing Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) (emphasis added); see also *United States. v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001).
[75] David M. Treiman, *Recklessness and the Model Penal Code*, 9 AMERICAN JOURNAL OF CRIMINAL LAW 281 (1981), at 351.

may be *voluto* if the accused has reconciled himself to, or accepted it as a part of the price he was prepared to pay to secure his objective.[76]

Dolus eventualis (*bedingter Vorsatz*) and especially its element of will are still a matter of dispute in German legal system. On the one hand, case law concerning this element is inconsistent. On the other hand, a considerable number of German legal scholars contend that *dolus eventualis* requires only an intellectual element, which most of them define as foresight of 'concrete possibility'.[77] German literature, as well as courts, treated *dolus eventualis* differently according to different theories on the subject. The following will examine the "consent and approval theory". This theory is applied by German courts,[78] and is usually referred to as the 'theory on consent and approval' (*Einwilligungs - und Billigungstheorie*).[79] The majority of German legal scholars who ascribe to this theory use a slightly different definition for *dolus eventualis*. They are of the opinion that the offender must 'seriously consider' (*ernstnehmen*) the result's occurrence and must accept the fact that his conduct could fulfil the legal elements of the offence.[80] Another way of putting the point is to say the offender must 'reconcile himself' (*sich abfinden*) to the prohibited result.[81]

This theory was implicitly adopted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Stakić case.[82] In establishing the requisite *mens rea* for the crime of murder as a Violation of the Laws or Customs of War under Article 3 of the ICTY, the Yugoslavia Tribunal had the following understanding regarding the technical definition of *dolus eventualis*: 'if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death.'[83] If, to the contrary, the offender is 'confident' (*vertrauen*) and has reason to believe that the result – though he foresees it as a possibility – will not occur, he lacks *dolus eventualis* and acts only negligently.[84]

---

[76] See FINBARR MCAULEY AND J. PAUL MCCUTCHEON, CRIMINAL LIABILITY (2000) 301-303.
[77] Heribert Schumann, *Criminal Law*, in INTRODUCTION TO GERMAN LAW, (Werner F. Ebke and Matthew W. Finkin eds., 1996), at 389-390.
[78] BGHSt 36, 1; 44, 99; BGH NStZ (Neue Zeitschrift fuer Strafrecht) 1999, p. 507; BGH NStZ 2000, 583.
[79] JOHANNES WESSELS AND WERNER BEULKE, STRAFRECHT: ALLGEMEINER TEIL 76 (2002).
[80] CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL, 376 (1997).
[81] Ibid.
[82] *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003 (*Stakić* Trial Judgment), para. 587.
[83] Ibid.
[84] Ibid.

In principle, and in order to avoid any uncertainties or ambiguities which may shadow the present discussion, we have to concede that *dolus eventualis*, like other types of *dolus*, namely *dolus directus* and *dolus indirectus*, should include the two components of intent: knowledge and wilfulness. Thus, if one of these components is missing, *dolus eventualis* no longer exists on the part of the perpetrator.[85]

Dolus Eventualis, Recklessness and the Lubanga Decision

As already mentioned, in the Lubanga case, PTC I of the ICC asserted that the reference to 'intention' and 'knowledge' in a conjunctive way, as set out in Article 30, requires the existence of a 'volitional element' on the part of the suspect.[86] Aware that the jurisprudence of the two *ad hoc* Tribunals has recognised other degrees of culpable mental states than that of direct intent (*dolus directus* of the first degree) and indirect intent (*dolus directus* of the second degree),[87] the ICC Pre-Trial Chamber went further, assuring that the volitional element mentioned above also encompasses other aspects of *dolus*, namely *dolus eventualis*.[88] According to the Pre-Trial Chamber *dolus eventualis* applies in situations in which the suspect '(a) is aware of the risk that the objective elements of the crime *may* result from his or her actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it.'[89] The Pre-Trial Chamber found it necessary to distinguish between two types of scenarios regarding the degree of probability of the occurrence of the consequence from which intent can be inferred:

> Firstly, if the risk of bringing about the objective elements of the crime is *substantial* (that is, there is a likelihood that it "will occur in the ordinary course of events"), the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from:
>
> (i) the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and
>
> (ii) the decision by the suspect to carry out his or her actions or omissions despite such awareness.

[85] The perpetrator could still be held criminally responsible and liable for being consciously negligent.
[86] Ibid., para. 351.
[87] Elewa Badar, *Drawing the Boundaries of Mens Rea*, *supra* note 49, at 313.
[88] *Lubanga* Décision sur la confirmation des charges, *supra* note 1, para. 352.
[89] Ibid., para. 352 (emphasis added, footnotes omitted).

Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may result from his or her actions or omissions.[90]

However, in situations where the suspect's mental state 'falls short of accepting that the objective elements of the crime may result from his or her actions or omissions, such a state of mind cannot qualify as a truly intentional realisation of the objective elements, and hence would not meet the "intent and knowledge" requirement embodied in article 30 of the Statute.'[91]

There are two important aspects of the PTC's clarification regarding the *mens rea* contours as set out in Article 30 of the ICC Statute. First, it appears that the Chamber adhered to the Romano-Germanic concept of intent which consists of two components, namely, *Wissen* and *Wollen* (Germany), *preveduto* and *voluto* (Italy), or *la conscience* and *la volonté* (France).[92]

Second, by requiring the existence of a volitional element on the part of the accused – in the sense of accepting the consequence – the ICC Pre-Trial Chamber accepted the civil law concept of *dolus eventualis* and ruled out the common law recklessness, as the latter falls short of meeting the *mens rea* threshold as set out in Article 30.[93]

---

[90] Ibid., paras. 353-354.
[91] Ibid., para. 355.
[92] In French criminal law, a distinction is made between two forms of intent, namely, *dol général* (general intent – to act unlawfully) and *dol spécial* which must be proved for certain offences. The term 'dol' in French criminal law means the deliberate intention to commit a wrong and involves both 'knowledge' that something is prohibited and the 'deliberate willingness' to carry out the proscribed conduct. The classic definition of *dol général* is provided by Emel Garçon, the eminent nineteenth century French criminal law scholar: "L'intention, dans son sens juridique, est la volonté de commettre le délit tel qu'il est déterminé par la loi; c'est la conscience, chez le coupable, d'enfreindre les prohibitions légales…" According to Garçon, *dol général* encompassed two mental elements: la conscience (awareness) and la volonté (willingness/desire). This definition of dol général was accepted by subsequent French legal scholars. The element of conscience, in French criminal law, simply refers to the accused's knowledge that he or she is breaking the law. This implies a similarity between the facts as understood by the perpetrator and as described in the criminal code. With regard to the element of 'desire', it is interpreted as simply referring to the accused's willingness to commit the wrongful act and not the desire to accomplish the result of the act in question. On French criminal law *see* JOHN BELL, SOPHIE BOYRON AND SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW, (1998); BRICE DIKSON, INTRODUCTION TO FRENCH LAW, (1994); EMILE GARÇON, CODE PÉNAL ANNOTÉ (1st ed., 1901); Catherine Elliot, *The French Law of Intent and Its Influence of the Development of International Criminal Law*, 11 CRIM L. FORUM 36 (2000). R. MERLE AND A. VITUE, TRAITÉ DE DROIT PÉNAL (1997).
[93] *Lubanga* Décision sur la confirmation des charges, *supra* note 1, at n. 438. For different opinions on the concept of *dolus eventualis see* GEORGE FLETCHER, RETHINKING CRIMINAL LAW, (2000) at 445-46: (*dolus eventualis* entails 'a particular subjective posture towards the result'); See also Mihajlo Acimovic, *Conceptions of Culpability in Contemporary American Law*, 26 LOUISIANA LAW REVIEW 28 (1965), at 48 (describing a Romanist law test according to which the perpetrator acted intentionally if

The Lubanga PTC I provided further clarification as to the reason of ruling out the notion of recklessness from the realm of Article 30 of the ICC Statute:

The concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention.[94]

It is significant in this regard to recall Professor Antonio Cassese's concerns, almost eight years prior to the Lubanga decision, regarding the exclusion of the notion of recklessness by the drafters of the Rome Statute:

While it is no doubt meritorious to have defined these two notions [intent and knowledge in Article 30], it appears questionable to have excluded recklessness as a culpable *mens rea* under the Statute. One fails to see why, at least in the case of war crimes, this last mental element may not suffice for criminal responsibility to arise. Admittedly, in the case of genocide, crimes against humanity and aggression, the extreme gravity of the offence presuppose that it may only be perpetrated when intent and knowledge are present. However, for less serious crimes, such as war crimes, current international law must be taken to allow for recklessness: for example, it is admissible to convict a person who, when shelling a town, takes a high an unjustifiable risk that civilian will be killed – without, however, *intending*, that they be killed – with the result that the civilians are, in fact, thereby killed.[95]

Cassese continued his criticism regarding the exclusion of recklessness as a culpable mental element under the Rome Statute in the following words:

Hence, on this score the Rome Statute marks a step backwards with respect to *lex lata*, and possibly creates a loophole: persons responsible for war crimes, when they acted recklessly, may be brought to trial and convicted before national courts, while they would be acquitted by the ICC. It would seem that the draughtsmen have unduly expanded the shield they intended to provide to the military.[96]

---

he could have said to himself: It may be either so or different, it may happen either so or differently; anyhow I shall act.) For a different opinion see Paul T. Smith, *Recklessness in Dolus Eventualis*, 96 SOUTH AFRICAN LAW JOURNAL 81 (1979): (criticizing South African law to the extent that it interprets *dolus eventualis* as indifference rather than foresight).

[94] *Lubanga* Décision sur la confirmation des charges, note 2 above, fn. 438.

[95] Cassese, *The Statute of the International Criminal Court*, *supra* note 63, at 153-154.

[96] Ibid., at 154.

However, it would be a profound mistake to draw from Cassese's hypothetical example that those persons will escape justice by claiming that their main aim was merely shelling a military objective and that they lack any intention regarding the killing of civilians. In such situations, those actors can incur criminal responsibility under the concept of *dolus eventualis* if the prosecution succeeds in demonstrating that in shelling the towns, it was probable that those civilians would be killed and that the actors accept such a result. Triffterer, for instance, has argued that the concepts of recklessness and *dolus eventualis* can be read within the text of Article 30 since the phrase 'will occur' as provided for in Article 30 of the ICC Statute may be interpreted to encompass situations in which 'the perpetrator is aware that a consequence might occur and nevertheless engages in taking action tending in that direction, thereby accepting its consequences'.[97] Kai Ambos disagrees:

> Certainly, reckless conduct cannot be the basis of responsibility since a corresponding provision was deleted. The same applies for the higher threshold of *dolus eventualis*: this is a kind of "conditional intent" by which a wide range of subjective attitudes towards the result are expressed and, thus, implies a higher threshold than recklessness. The perpetrator may be indifferent to the result or be "reconciled" with the harm as a possible cost of attaining his or her goal… However, [in such situations of *dolus eventualis*] the perpetrator is not, as required by Article 30(2)(b), aware that a certain result or consequence will occur in the ordinary course of events. He or she only thinks that the result is possible. Thus, the wording of Article 30 hardly leaves room for an interpretation which includes *dolus eventualis* within the concept of intent as a kind of "indirect intent."[98]

The exclusion of recklessness as a culpable mental element within the meaning of Article 30 runs in harmony with the basic principles of Islamic law (*Shari'a*) that no one shall be held criminal responsible for *hudud* crimes (offences with fixed mandatory punishments) or *qisās* crimes (retaliation) unless he or she has wilfully or intentionally (*'amdān*) committed the crime at issue.[99]

---

[97] Triffterer, 'The New International Criminal Law', *supra* note 53, at 706.

[98] Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L. FORUM 1-32 (1999), at 21-2.

[99] For an in depth analysis of the criminal intent in Islamic criminal law *see* MOHAMED ELEWA BADAR, THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH (Hart Publishing, June 2009).

The Meaning of Knowledge

Paragraph three of Article 30 provides two definitions of knowledge. The first applies to consequences, whereas the second pertains to attendant circumstances. Under the ICC Statute, the distinction between acting 'intentionally' and 'knowingly' is very narrow. Knowledge that a consequence 'will occur in the ordinary course of events' is a common element in both conceptions.'[100] A result is 'knowingly' caused if the actor is aware that 'a consequence will occur in the ordinary course of events'.[101] With 'attendant circumstances', one acts 'knowingly' if he is aware 'that a circumstance exists'.[102]

[100] Compare Rome Statute, Article 30 (2) (b) and Article 30 (3).
[101] Rome Statute, Article 30(3).
[102] Rome Statute, Article 30(3).

Knowledge in Relation to the Circumstance Element

Logically speaking, there is no offence which requires the prosecution to prove that the accused, in the true sense, intends a particular circumstance to exist at the time he carries out his conduct. If the accused intends a circumstance to exist, it means that he hopes it exists or will exist. According to the ICC Statute, knowledge as to the circumstance element arises in various situations. It can relate to circumstances forming part of the definition of the crime, i.e. the requirement of knowledge of the widespread or systematic attack directed against any civilian population as provided for in the chapeau element of Article 7.[103] The same can be said regarding the crime of rape, punishable as a crime against humanity[104] or as a war crime,[105] where the non-consent of the victim and the perpetrator's knowledge thereof is considered as constitutive element of the offence.[106] The wording of Article 30 makes it clear that 'knowingly' refers to the actor's subjective state of mind and not the state of mind of a reasonable person.

Additionally, in defining 'knowledge' to mean the perpetrator's '*awareness* that a circumstance exists', Article 30(3) limits the meaning of knowledge to 'actual knowledge' as opposed to 'constructive knowledge'. Even knowledge of 'high probability' of the existence of a particular fact does not pass Article 30's culpability test.[107] There is reason to question whether the doctrine of 'wilful blindness' or 'wilfully shutting one's eyes to the obvious' satisfies the *mens rea* threshold of Article 30(3). The answer can be in the affirmative if the doctrine is understood to apply only in situations where the perpetrator is virtually certain that the fact exists, or, as stated by Glanville Williams:

---

[103] Rome Statute, Article 7(1): 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack.'
[104] Rome Statute, Article 7(1)(g).
[105] Rome Statute, Articles 8(2)(b)(xxii), and Article 8(2)(e)(vi).
[106] *Contra* see *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, 7 July 2006, (*Gacumbitsi* Appeal Judgment) in which the prosecution argued that non-consent of the victim and the perpetrator's knowledge thereof should not be considered as constitutive elements of the offence that must be proved by the Prosecution.
[107] *Contra* see the Model Penal Code § 2.02(7) which stretched the definition of knowledge with regard to the attendant circumstance to encompass 'awareness of *high probability* of the existence of a particular fact'.

A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This and this alone, is wilful blindness.[108]

Any attempts to stretch the wilful blindness doctrine by accepting some lesser degree of knowledge instead of actual knowledge would blur the distinction between wilful blindness and recklessness. There are, however, exceptions to the application of the 'actual knowledge' standard with regard to the factual elements of particular crime. The Elements of Crimes of the 'war crime of using, conscripting or enlisting children' under the age of fifteen years into the national armed forces, or using them to participate actively in hostilities,[109] allow for a lower level of knowledge than that of 'actual knowledge'.[110] According to paragraph three of the Elements of Article 8(2)(b)(xxvi) the perpetrator can incur criminal responsibility if he 'knew' or 'should have known' that the child concerned was under the age of 15. Thus, the Elements of Crimes made it clear that 'constructive knowledge' is a sufficient *mens rea* standard with regard to the circumstance element of this crime. As a consequence, this crime falls into the realm of 'negligence crimes' where conviction depends upon proof that the perpetrator had 'reasonable cause' to believe or suspect some relevant fact, in the present case, that the child concerned was under the age of 15.

The vital point is that constructive knowledge differs from the two other degrees of knowledge, namely, actual knowledge and wilful blindness, in requiring neither awareness nor purposive avoidance of the means of learning the truth. Another way of putting the point is to say that the perpetrator may incur criminal liability for being negligent with regard to a circumstance when, as reasonable person, he ought to know that such 'circumstance exists or will exist and fails to do so, whether he has given thought to the question or not.'[111]

---

[108] Glanville Williams, *Criminal Law*: *The General Part*, *supra* note 23, at 159.

[109] Rome Statute, Article 8(2)(b)(xxvi); Article 8(2)(e)(vii). It is to be noted that the latter Article incriminate the enlisting of children into "armed forces or groups". The reason is that this Article applied to war crimes committed in armed conflicts not of an international character.

[110] Elements of Crimes, U.N. Doc. ICC-ASP/1/3, 1st Sess., Official Record (adopted by the Assembly of States Parties on September 9, 2002) reprinted in WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (2004) 310. Article 8(2)(b) (xxvi) War Crime of using, conscripting or enlisting children. See Kelt and von Hebel, *General Principles of Criminal Law and the Elements of Crimes*, *supra* note 7, at 31.

[111] SMITH & HOGAN, CRIMINAL LAW, (2005) at 109-110.

Another example of lowering the actual knowledge standard to reach the one of constructive knowledge appears at the third paragraph of the Elements of the "war crimes of improper use of a flag of truce"[112] and the "war crime of improper use of a flag, insignia or uniform of the hostile party".[113] According to the third paragraph common to both provisions, it is sufficient to hold the perpetrator criminally liable if he 'knew or should have known of the *prohibited nature* of such use.'[114] The term 'prohibited nature' denotes the illegality of the conduct.

It is obvious that such a negligence standard is inconsistent with the *mens rea* threshold as set out in Article 30 of the Rome Statute – that all the materials elements of a crime be committed with intent and knowledge.

3. THE RELATIONSHIP BETWEEN ARTICLE 30 AND OTHER PROVISIONS OF THE ICC STATUTE

Article 30 vis-à-vis the Culpability Requirements stated in an Offence Definition

As noted by Professor Schabas, several crimes within the subject matter jurisdiction of the ICC have their 'own built-in *mens rea* requirement.'[115] The crime of genocide, punishable under Article 6 of the ICC Statute, is defined as a proscribed act committed 'with intent to destroy' a protected group.[116] The chapeau element of crimes against humanity requires a subjective element of knowledge that the attack was carried out in a widespread or systematic manner against a civilian population.[117] Extermination, a crime against humanity, 'includes the intentional infliction of conditions of life … calculated to bring about the destruction of part of a population.'[118] Several war crimes punishable as grave breaches of the 1949 Geneva Conventions, or serious violations of the laws and customs of war under Article 8 of

[112] Elements of Crimes, Article 8(2)(b)(vii)-1, reprinted in SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, *supra* note 110, at 299.
[113] Elements of Crimes, Article 8(2)(b)(vii)-2., reprinted *ibid* at 299.
[114] Elements of Crimes, Article 8(2)(b)(vii)(3)-1, and Article 8(2)(b)(vii)(3)-2, reprinted *ibid* at 299 (emphasis added).
[115] SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, *supra* note 110, at 108.
[116] Rome Statute, Article 6(1).
[117] Rome Statute, Article 7.
[118] Rome Statute, Article 7 (2)(b), (emphasis added).

the ICC Statute, have their own built-in *mens rea* such as the adjectives 'wilful', 'wilfully', 'wantonly', 'intentionally', or 'treacherously'.[119]

The first question which arises is whether the *mens rea* threshold of Article 30 would automatically apply to cover the material elements of such offences, even if the crime at issue contains in its language a mental element. The second question is an outcome of the first. If the crime at issue required a lower or a higher threshold than the one provided for in Article 30, which threshold should then prevail? In other words, does Article 30 allow a departure from the *mens rea* standard laid down in it? Another difficulty appears in applying the rule of '*mens rea* coverage' on particular crimes which requires a proof of 'special intent' (e.g. the intent to destroy a group in the crime of genocide). In such type of offence, this 'ulterior intent' has no material element to cover, since the actual destruction of a group is not an ingredient element of the offence.

'Unless otherwise provided', a proviso which is set out in the very beginning of the first paragraph of Article 30, appears to come as the Prince who redeems Cinderella from her poor circumstances. According to this proviso, ICC judges have to consider Article 30 as a default rule that is applied to all crimes and modes of participation in criminal conduct, so long as there are no specific rules on the mental element expressly stated in these provisions,[120] and hence paving the road to the application of the *lex specialis* principle. Donald Piragoff, who was the first to comment on Article 30, has a different opinion regarding the relationship between Article 30 and particular crimes which requires that the material elements be 'intentional' or be committed 'intentionally'. He noted that given the general rule in Article 30, the inclusion of these adjectives in the definition of particular crimes 'is likely unnecessary surplusage'.[121] He pointed out that '[t]he specific presence of these terms is likely a product of the negotiations process whereby certain delegations

[119] Rome Statute, Article 8. Other crimes provided for in the ICC Statute contains in their definition a subjective element, see Article 7(2) (e), (f) and (h); Article 8 (2) (b) (i), (ii), (iii), (iv), (ix), (xxiv) and (xxv), and Article 8 (2) (e) (i), (ii), (iii) and (iv).

[120] See in general Werle and Jessberger, *Unless Otherwise Provided*, *supra* note 27. Piragoff hold the same opinion: 'The major significance of Article 30, however, is its affect on definitions that do not expressly specify a mental element. Although a particular definition of a crime may be silent as to the requisite mental element, Article 30 would import the mental elements of "intent and knowledge" as being the mental elements require in order to render an accused criminally responsible and liable for punishment for that particular crime.' See Donald D. Piragoff, *Article 30 – Mental Element*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 527-535 (Otto Triffterer ed., 1999) at 531.

[121] Ibid., at 531.

wished to make clear the intentional nature of the crimes before they agreed to their inclusion in article 7 and 8.'[122] It was said that the only significance of Article 30 to these provisions is that it imports the element of knowledge into those definitions of crimes.[123]

But the subjective elements included in the definition of the crime against humanity of extermination are not mere redundant. Article 7(2)(b) of the ICC Statute defines extermination to include 'the intentional infliction of conditions of life … *calculated* to bring about the destruction of part of a population.' The term 'calculated' as it appears in Article 7(2)(b) can be interpreted as requiring a higher threshold of *mens rea* than that provided for in the default rule of Article 30. It can be interpreted as requiring an element of premeditation, a subjective mental state which requires that the accused, at a minimum, held a deliberate plan to exterminate prior to the act causing the destruction of part of a population, rather than forming the intention simultaneously with the act. (Roger's Comments – the drafting history).

By including the 'unless otherwise provided' in the provision of Article 30, the codifiers of the ICC Statute have achieved several goals. On the one hand, Article 30, for the first time in the sphere of international criminal law, sets a general requirement for international criminal liability which is based on intent and knowledge. On the other hand, 'unless otherwise provided' enables the Statute to absorb the corresponding rules of international humanitarian law (the definition of war crimes under Article 8) without having to modify the definitions of these crimes . It also enables the Statute to adopt verbatim the definition of the crime of genocide, as defined in the 1948 Genocide Convention, without having to change any of its subjective elements.

Article 30 vis-à-vis the Elements of Crimes

Article 30 of the ICC Statute has to be read together with several provisions set out in the ICC Statute. Article 21, which constitutes the first codification of the sources of international criminal law, establishes a hierarchy of applicable law to be applied by judges of the International Criminal Court.[124] According to Article 21(1)(a) of the ICC Statute, the Court shall apply in the first place (i) its Statute, (ii) Elements of Crimes

[122] Ibid.
[123] Ibid.

and (iii) its Rules of Procedure and Evidence.[125]

It is worth stressing that the general introduction to the Elements of Crimes[126] which consists of ten paragraphs has a great significance on the interpretation and the application of Article 30. Paragraph one of the general introduction reiterates the provision laid down in Article 9(1) of the ICC Statute and reassures that the Elements of Crimes 'shall assist the Court in the interpretation and application of articles 6, 7, and 8.'

Paragraph 2 states that 'where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e. intent, knowledge, or both, set out in Article 30, applies. Exceptions to the Article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.'

According to paragraph 3, 'existence of intent and knowledge can be inferred from relevant facts and circumstances.' Paragraph 4 provides that 'with respect to mental elements associated with elements involving value judgment, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated'.

Paragraph 2 of the general introduction will come into play in situations where the Elements of Crimes for particular crimes, provide for a lower threshold of *mens rea* (negligence standard) than that of Article 30. For instance, while Article 30(3) of the ICC Statute assigns a knowledge standard with regard to the circumstance element of the crime of genocide by 'forcibly transferring children of the group to another group' (the age of the victim concerned),[127] the Elements of Crimes introduce a negligence standard (should have known) with regard to the same circumstance element of this offence. Addressing this point Professor Claus Kress had this to say:

It is impossible to reconcile this standard [negligence] with Article 30(1) [intent and knowledge] of the *ICC* Statute so that the question arises as to whether the deviation can be justified on the basis of the

---

[124] Margaret McAuliffe deGuzman, *Article 21 Applicable Law*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 435 (Otto Triffterer ed., 1999) at 436-438.

[125] Rome Statute, Article 21.

[126] Adopted by the Preparatory Commission of the International Criminal Court in June 2000, see Report of the Preparatory Commission for the International Criminal Court. Finalized draft text of the Rules of Procedure and Evidence (PCNICC/2000/1/Add.1); and Finalized draft text of the Elements of Crimes (PCNICC/2000/1/Add.2).

[127] Rome Statute, Article 6 (e).

words "unless otherwise provided" in Article 30(1) of the *ICC* Statute. As there is no "colourable support" for the deviation in prior case law the answer would appear to depend on whether the *ICC* Elements of Crimes can *by themselves* "provide otherwise". It is submitted that they cannot, though a sentence in the Elements' "General introduction" may be read to suggest the contrary.[128]

In Lubanga, the PTC I affirmed that the ICC Elements of Crimes can by themselves 'provide otherwise'.[129] Lubanga was charged with conscripting and enlisting children under the age of fifteen years into armed forces, and using them to participate actively in hostilities, a crime punishable under articles 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Statute. The third element of the Elements of Crimes assigns a negligent standard (should have known) with regard to the circumstance element (the age of the victim concerned) of these offences.[130] Relying on the "unless otherwise provided" clause, the Pre-Trial Chamber considered this element of negligence, as set out in the Elements of Crimes of the above mentioned provisions, an exception to the 'intent and knowledge' standard provided in Article 30(1).[131]

As for the fifth element of the Elements of the Crimes for the crime under consideration, the Pre-Trial Chamber noted that this 'Element' requires only that 'the perpetrator was aware of the factual circumstances that established the existence of an armed conflict', without going as far as to require that the accused conclude, on the basis of a legal assessment of the said circumstances, that there was an armed conflict.'[132] The same applies *mutatis mutandis* to the crime of genocide by forcibly transferring children. It would be sufficient to demonstrate that the perpetrator was negligent regarding the circumstance element, namely the fact that the victims forcibly transferred were under the age of 18 years.[133]

---

[128] Claus Kress, *The Crime of Genocide under International Law*, 6 *ICLR* 461 (2006) at 485 (emphasis in original, footnotes omitted).
[129] Lubanga Décision sur la confirmation des charges, *supra* note 1, para. 356.
[130] Ibid., para. 358. The Pre-Trial Chamber I observed that: 'The "should have known" requirement set forth in the Elements of Crimes – which is to be distinguished from the "must have known" or constructive knowledge requirement – falls within the concept of negligence because it is met when the suspect: i. did not know that the victims were under the age of fifteen years at the time they were enlisted, conscripted or used to participate actively in hostilities; and ii. lacked such knowledge because he or she did not act with due diligence in the relevant circumstances one can only say that the suspect" should have known" if his or her lack of knowledge results from his or her failure to comply with his or her duty to act with due diligence).'
[131] Ibid., paras. 356-359.
[132] Ibid., para. 360.
[133] See the sixth element of the Elements of Crimes of Article 6(e) Genocide by forcibly transferring children. For more information on this specific crime see Kurt Mundorff, 2008, *Working Paper: Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*,

One might wonder whether such a lower standard of culpability (negligence) is sufficient for crimes that have a very specific object. "Forcibly transferring children of the group to another group", "using, conscripting or enlisting children into armed forces" and "compelling a prisoner of war to serve in the forces of a hostile power" are crimes, the very definition of which explicitly state the object against which certain acts are directed (i.e. children and prisoners of war).[134] One might suggest that in such categories of crimes which have a very specific object, knowledge, as opposed to mere negligence, has to be assigned to the circumstance element. There is no provision at the Rome Statute which *obliges* the honourable judges of the ICC to apply the Elements of Crimes. The plain text of Article 9 states that these Elements of Crimes '*shall* assist the Court in the interpretation and application of articles 6, 7, and 8.' However, the application of these Elements might infringe one of the most fundamental rights of the accused, namely, the presumption of innocence. It is up to honourable judges of the ICC to decide on that issue and not to adhere to approach adopted by the Pre-Trial Chamber I in the Lubanga case.

Furthermore, the Elements of Crimes includes the following 'alien element' as an element of the crime of genocide: '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'[135] If one considers this element as a 'circumstance element', it has to be covered by the default rule of Article 30 of the ICC Statute and, as consequence, the prosecution must prove that the perpetrator is aware that his proscribed conduct (i.e. of killing members of the group) 'took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'[136]

Article 30 vis-à-vis Individual Criminal Responsibility – Article 25

Article 25 of the ICC Statute which is entitled 'individual criminal responsibility' provides for various forms of perpetration and participation in a criminal conduct.

.The Selected Works of Kurt Mundorf, available at http://works.bepress.com/kurt_mundorff/3/, last visited June 22, 2008.

[134] Erkin Gadirov, *Article 9 – Elements of Crimes*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, (Otto Triffterer ed., 1999) at 301-302.

[135] Elements of Crimes, UN Doc. ICC-ASP/1/3, 1st Sess., Official Record (adopted by the Assembly of States Parties on September 9, 2002) pp. 113-115.

[136] ICC-ASP/1/3, Article 6(a) Genocide by killing.

Sub-paragraph (a) of paragraph 3 refers to three forms of perpetration. Yet, under the ICC Statute a person shall incur criminal responsibility if he or she commits any of the crimes within the jurisdiction of the ICC 'whether as (i) an individual, (ii) jointly with another, or (iii) through another person, regardless of whether that other person is criminally responsible'.[137]

From a German criminal law perspective, element (i) speaks about *unmittelbarer Täter* (the direct perpetrator who physically carried out the material elements of the offence in person); element (ii) deals with *Mittäterschaft* (co-perpetration); and the third form of perpetration is concerned with *mittelbarer Täter* or *Hintermann* (indirect perpetrator, a person who acts through the agency of another). This latter form of perpetration was defined by the 1996 Preparatory Committee in the following words, '[a] person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or person acting under mistake of fact or otherwise acting without *mens rea*.'[138]

Co-perpetratorship

The first test of the notion of co-perpetratorship as provided for in Article 25(3)(a) of the ICC Statute was made by Pre-Trial Chamber 1, in the Lubanga case.[139] There the Chamber agreed with scholarly opinions that the concept of co-perpetration

> is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to whole crime.[140]

The Chamber noted that 'the definitional criterion of the concept of co-perpetration is linked to the distinguishing between principles and accessories to a crime where a criminal offence is committed by a plurality of persons.'[141] The Chamber realised that

[137] Rome Statute, Article 25(3)(a), (letters added).
[138] BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE, (2005) at 200.
[139] *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 322-367.
[140] Ibid., para. 326.
[141] Ibid.

there are three different approaches to differentiate between principals and accessories to a crime, namely, (1) the objective approach (only those who physically carry out one or more of the objective elements of the offence can be considered principles to the crime);[142] (2) the subjective approach adopted by the two *ad hoc* Tribunals through the concept of joint criminal enterprise places the focus on the state of mind in which the contribution to the crime was made; [143] and (3) the third approach – the one adopted by the Pre-Trial Chamber for distinguishing between principals and accessories – is the concept of 'control over the crime'.[144]

According to the Pre-Trial Chamber 'this approach involves an objective element, consisting of the appropriate factual circumstances for exercising control over the crime, and a subjective element, consisting of the awareness of such circumstances.'[145] The Chamber asserted that the main feature of this concept is that 'principals to a crime are not limited to those who physically carry out the objective element of the offence, but also include those, who, in spite of being … [remote] from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will committed.'[146] They are principals and not accomplices because they have, along with others, control over the offence by reason of essential tasks assigned to them.[147]

From a German criminal law perspective, the ICC Pre-Trial Chamber adhered to the notion of *Mittäterschaft* (co-perpetration) based on *funktionelle Tatherrschaft* (functional control over the crime). The Chamber, however, deviated from Professor Roxin's theory which restricted the notion of co-perpetration based on functional control over the crime for those who contribute to the commission of the crime at its execution stage.[148] According to the Chamber, those who contribute at the preparatory stage as well as at the execution stage fall within the ambit of co-perpetration as set out in Article 25(a) of the ICC Statute as long as the following objective and subjective elements are met:

[142] Ibid., para. 328.
[143] Ibid., para. 329.
[144] Ibid., para. 330.
[145] Ibid., para. 331.
[146] Ibid., para. 330.
[147] Ibid., para. 332.
[148] CLAUS ROXIN, TÄTERSCHAFT UND TATHERRSCHAFT, (2000) at 294, 299.

(i) the existence of an agreement or common plan between two or more persons (objective element);[149]

(ii) co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime (objective element);[150]

(iii) the fulfilment of the subjective element of the crime in question by the co-perpetrators including any requisite *dolus specialis* or ulterior intent for the type of crime involved;[151]

(iv) the co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime;

(v) the co-perpetrator must be aware of the factual circumstances enabling him to jointly control the crime.[152]

As far as the subjective elements are concerned, element (iii) can be satisfied if the co-perpetrator acted with any of the following mental states *dolus directus* of the first degree, *dolus directus* of the second degree, or *dolus eventualis*. These *mens rea* standards – as already discussed above – satisfy the threshold of the mental element embodied in Article 30 of the ICC Statute. However, in situations where the definition of the crime requires a specific intent, such as the case of persecution as a crime against humanity or genocide, the prosecution has to demonstrate that each co-perpetrator possesses such a specific intent.[153]

Element (iv) requires proof of 'double intent' on the part of the co-perpetrators, namely, a 'cognitive component' and a 'volitional component'. As for the former, it must be proved that all co-perpetrators at the time they agreed to start the implementation of their common plan were mutually *aware* of the risk that such implementation may result in the realisation of the objective elements of the crime.[154] As for the volitional component, it has to be proved that all co-perpetrators 'mutually accept[ed] such a result by reconciling themselves with it or consenting to it.'[155]

The requirement of such a subjective element for the notion of co-perpetration based on joint control over the crime will inevitably stands against the application of any lower threshold than that of *dolus eventualis*. That is to say the negligence

[149] *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 343-345.
[150] Ibid., paras. 346-348.
[151] Ibid., para. 349-360.
[152] Ibid., paras. 366-367.
[153] Ibid., para. 349.
[154] Ibid., para. 361.
[155] Ibid.

standard (should have known) assigned to the circumstance element (the age of the victim concerned) of the war crime of enlisting or conscripting children will not be applicable in the instant case.[156]

Element (v) is the third and last subjective element required for the notion of co-perpetration based on joint control of the crime. According to the Pre-Trial Chamber this element requires the accused to be aware

> (i) that his or her role is essential to the implementation of the common plan, and hence in the commission of the crime, and
> (ii) the he or she can – by reason of the essential nature of his or her task – frustrate the implementation of the common plan, and hence the commission of the crime, be refusing to perform the task assigned to him or her.[157]

Aiding and Abetting

Sub-paragraph (c) of Article 25(3) of the ICC Statute assigns a high threshold of *mens rea* for the aiders and abettors, 'which goes beyond the ordinary *mens rea* requirement within the meaning of Article 30.'[158] Accordingly, Article 25(3)(c) limits the accomplice liability to instances in which there exists the *purpose* of promoting or facilitating the commission of the offence. If that is the case, the prosecution must demonstrate that the aider and abettor's conscious objective is to facilitate the commission of the crime.

It is worth pointing out that the phrase 'for the purpose of facilitating', as it appears in the very beginning of sub-paragraph (c), is borrowed from § 2.06(3)(a) of the Model Penal Code. The issue, whether a lower culpable mental state than that required for the principal perpetrator should be assigned to the aider and abettor, was heavily criticised by the commentators of the Model Penal Code as 'incongruous and unjust'.[159] They assured that 'the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.'[160]

---

[156] Ibid., para. 365.
[157] Ibid., paras. 366-367.
[158] Kai Ambos, *Article 25 – Individual Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 435 743-769 (Otto Triffterer ed., 2008) at 757.
[159] *Model Penal Code and Commentaries*, *supra* note 6, § 2.06 Comment at 312, at n. 42.
[160] Ibid.

Reading Article 25(3)(c) together with Article 30, it was questioned whether the conjunctive formulation (intent and knowledge) provided in the latter provision runs directly counter to international jurisprudence that an aider and abettor 'need not share the same *mens rea* of the principal perpetrator (*e.g.* intent to kill), and that a "knowing participation in the commission of an offence" or awareness of the act of participation coupled with a conscious decision to participate" is sufficient.'[161] The problem could be approached in two ways. The first approach is proposed by Piragoff in his commentary on Article 30 of the ICC Statute:

> It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation. Even if a strict literal reading of the conjunctive in paragraph 1 were made such that an accomplice must intend the consequence committed by the principal, the same interpretative result would occur. Article 30 para. 2(b) makes it clear that "intent" may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of "knowledge", as defined in Article 30 para. 3. Therefore, if both "intent" and "knowledge" are required on the part of an accomplice, these mental elements can be satisfied by such awareness. Therefore, article 30 confirms the existing international jurisprudence.[162]

The second approach relies on recent judgments delivered by the two *ad hoc* Tribunals in which the Appeals and Trial Chambers demand some sort of volitional element in addition to the knowledge requirement.[163] Yet, in the *Orić* case, it was held that aiding and abetting must be intentional in the sense that 'the aider and abettor must have *double intent*, namely both with regard to the furthering effect of his own contribution and the intentional completion of the crime by the principal perpetrator.'[164]

As far as the objective elements of aiding and abetting are concerned, Schabas noted that Article 25(3)(c) 'does not provide any indication as to whether there is some quantitative degree of aiding and abetting required to constitute the *actus reus* of

[161] Piragoff and Robinson, *Mental Element – Article 30*, *supra* note 5, at 855.
[162] Ibid.
[163] *Blaškić* Appeal Judgment, *supra* note 22, para. 41.
[164] *Orić* Trial Judgment, *supra* note 22, para. 288 (emphasis added, footnotes omitted).

complicity.'[165] In sum, while sub-paragraph (c) provides for relatively low objective requirements of aiding and abetting, it assigns a relatively high subjective threshold.[166]

Common Purpose

Unlike the Statutes of the two *ad hoc* Tribunals, the Rome Statute of the International Criminal Court makes explicit reference to the theory of 'group criminality' (common purpose). Sub-paragraph (d) of Article 25(3) of the ICC Statute introduces the concept of 'common purpose', as a punishable mode of criminal conduct in the following words:

> In any other way contributes to the commission or attempted commission of such crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> (ii) Be made in the knowledge of the intention of the group to commit the crime.[167]

The first words of Article 25(3)(d) has been subject to different interpretations. The words '[i]n any other way contributes to the commission or attempted commission of such crime' was viewed by Professor Albin Eser as well as the Lubanga PTC as providing for a 'residual form of accessory liability'.[168] Aware that Article 25(3)(d) of the ICC Statute provides for secondary participation as opposed to perpetration, the ICC Prosecutor, in the Document Containing the Charges in the Lubanga case, submitted that 'common purpose' could properly be considered as a third applicable mode of criminal liability.'[169] Yet if that is the case, 'common purpose' as provided for in Article 25(3)(d) will always be the last resort for the ICC Prosecutor and will not be his "darling notion" as the case of joint criminal enterprise under the

---

[165] William A. Schabas, *General Principles of Criminal Law in the International Criminal Court Statute (Part III)*, 6 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 84 (1998), 95-98.
[166] Ambos, 'Individual Criminal responsibility', *supra* note 158, 757. Eser arrived to the same conclusion, see Eser, *Individual Criminal Responsibility*, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, (Cassese *at al* eds., 2002) at 801.
[167] Rome Statute, Article 25(3)(d).
[168] Eser, *Individual Criminal Responsibility*, *supra* note 166, at 802-804.
[169] *Prosecutor v. Thomas Lubanga Dyilo*, case No. ICC-01/04-01/06-356, Document Containing the Charges, Article 61(3)(a), August 28, 2006, para. 20.

jurisprudence of the Yugoslavia and Rwanda Tribunals. Whether the International Criminal Court will adhere to such interpretation by its PTC I, or whether it will interpret "common purpose" in the same way as it is interpreted under the jurisprudence of the two *ad hoc* Tribunals, is yet to be ascertained.

It might be held that 'common purpose' as a mode of criminal participation under Article 25(3)(d) will be appropriate to apply in situations which Professor Cassese named 'liability for participation in an institutionalized common criminal plan'.[170] He states:

> Plainly, in an internment camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also his senior aides and those who physically inflict torture and other inhumane treatment are responsible. Also those who discharge administrative duties indispensable for the achievement of the camp's main gaols (for example, to register the incoming inmates, record their death, give them medical treatment or provide them with food) may incur criminal liability. They bear this responsibility so long as they are aware of the serious abuses being perpetrated (knowledge) and willingly take part in the functioning of the institution. That they should be held responsible is only logical and natural; by fulfilling their administrative or other operational tasks, they contribute to the commission of crimes. Without their willing support, crimes could not be perpetrated. Thus, however marginal their role, they constitute an indispensable cog in the murdering machinery.[171]

As noted above, Article 21 of the ICC Statute establishes a hierarchy of applicable law to be applied by judges of the International Criminal Court. According to Article 21(1)(a) of the ICC Statute, the Court shall apply in the first place its Statute,[172] and in the second place 'applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict.'[173] It is undeniable that the International Criminal Court will resort to the symmetric jurisprudence of the Yugoslavia and Rwanda Tribunals in order to shape this mode of 'group criminality' under Article 25(3)(d). However, the ICC will encounter a legal dilemma if it adopts literally the three categories of joint criminal enterprise as developed in the case law of two *ad hoc* Tribunals.[174] This difficulty stems from the

---

[170] Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 *JICJ* 109 (2007), at 112.
[171] Ibid.
[172] Rome Statute, Article 21.
[173] Rome Statute, Article 21.
[174] The notion of joint criminal enterprise as adopted by the two ad hoc Tribunals has been a source of endless fascination for commentators, generating an enormous amount of literature: Allen O'Rourke, *Joint Criminal Enterprise and Brđanin: Misguided Over-Correction*, 47 HARVARD INTERNATIONAL

fact that the subjective elements provided for in Article 25(3) sub-paragraphs (d)(i) (aim of furthering the criminal activity of the group) and (d)(ii) (knowledge of the intention of the group) will stand up against any application of the 'extended form' of joint criminal enterprise (JCE III).[175]

Article 30 vis-à-vis Superior Responsibility – Article 28

Article 28 of the ICC Statute sets forth two different levels of culpability regarding military and civilians commanders. As for the military commanders, or persons effectively acting as military commanders, Article 28(a)(i) of the ICC Statute assigns both actual knowledge (knew) or constructive knowledge (should have known). The term 'should have known' which is akin to negligence – a type of legal fault not necessarily involving a mental state – differs from the language employed in Articles 7(3)/6(3) of the ICTY/ICTR Statutes. There, the term 'had reason to know' is set out as a second alternative of knowledge which has to be proved on the part of the commander. It appears that the drafters of the ICTY/ICTR Statutes unlike those of the ICC Statute have carefully read the *travaux préparatoires* of Article 86 (then Art. 76 – Failure to Act) of Protocol 1 to the 1949 Geneva Conventions. During the preparatory work of the first Additional Protocol many delegations expressed their concerns regarding the inclusion of the phrase 'should have known' in then Article 76.[176] Syria submitted an amendment suggesting the deletion of the phrase 'should

---

LAW JOURNAL 307 (2006); Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 JICJ 109 (2007); Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Law*, 93 CALIFORNIA LAW REVIEW 75 (2005); Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 JICJ (2007) 159; Mohamed Elewa Badar, "*Just Convict Everyone!" 'Joint Perpetration: From Tadić to Stakić and Back Again*, 6 ICLR 293 (2006); Kai Hamdorf, *The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law*, 5 JICJ 208 ((2007); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 JICJ 69 (2007); Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy*, 2 JICJ 446 (2004) ; Katrina Gustafson, *The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability: A Critique of Brđanin*, 5 JICJ 134 (2007); Harmen van der Wilt, *Joint Criminal Enterprise, Possibilities and Limitations*, 5 JICJ 91 (2007); Elies van Sliedregt, *Pathway to Convicting Individuals for Genocide*, 5 JICJ 184 (2007).

[175] For critical analysis of the third category of JCE see Mohamed Elewa Badar, "Just Convict Everyone!" 'Joint Perpetration: From *Tadić* to *Stakić* and Back Again', 6 ICLR 293 (2006).

[176] The *travaux préparatoires* of the first Additional Protocol is reproduced in four volumes and one supplement in the work of HOWARD S. LEVIE, PROTECTION OF WAR CRIMES: PROTOCOL 1 TO THE 1949 GENEVA CONVENTIONS, (1981). The Supplement appears in year (1985).

have known'.[177] This was endorsed by the delegation of Argentina who drew the working group's attention to the fact that 'penal responsibility should be interpreted in a very clear sense' and that the phrase 'should have known', as it appears in the ICRC draft, 'introduced a lack of clarity with regard to the conduct of superiors'.[178] He concluded by saying that the phrase 'would be tantamount to reserving the responsibility for submitting proof, which would be incompatible with the presumption of innocence common to all Latin American legal systems'.[179]

At the Rome Conference, and as far as the requisite *mens rea* for command responsibility was concerned, the United States submitted a proposal in which it distinguished between the levels of culpability required for military commanders and civilian superiors:

> An important feature in military command responsibility and one that was unique in a criminal context was the existence of *negligence* as a criterion of *knew or should have known* that the forces under his control were going to commit a criminal act. ... The negligence standard was not appropriate in a civilian context and was basically contrary to the usual principles of criminal law responsibility.[180]

Israel supported the United States' proposal in principle, but suggested the insertion of the words 'or ought to have known' after 'knew' in subparagraph (b)(i) of article 25 as set out in the Preparatory Committee's 1998 draft statute.[181] In the view of the Israeli delegate, this would establish 'the principle that a superior not only had actual knowledge but also what he would term "constructive'" knowledge, in other words, being equally responsible for failing to appreciate facts which he or she was in a position to know.'[182]

Recent jurisprudence of the Yugoslavia and Rwanda Tribunals has stressed that 'criminal negligence is not a basis of liability in the context of criminal responsibility.'[183] These evolutionary developments in the law of command

---

[177] Proposed Amendment to Article 76 by Syrian Arab Republic, CDDH/1/74, 20 March 1974, *Official Records*, Volume III, p. 328, in Levie, *Protection of War Crimes*, *ibid*., at 302.
[178] Mr. Cerda (Argentina), CDDH/I/74, in Levie, ibid., at 306.
[179] Ibid.
[180] Proposal submitted by the United States (A/CONF.183/C.1/L.2) (emphasis added) reprinted in M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: SUMMARY RECORDS OF THE DIPLOMATIC CONFERENCE, (2005) paras. 67-68.
[181] UN Doc. A/CONF 183/C.1/SR.1 (16 June 1998), Mr. Nathan (Israel), reprinted in Bassiouni, *Summary Records of the Diplomatic Conference*, *ibid*., at 78, para. 73.
[182] Ibid.
[183] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Trial Judgment, 16 November 2005, (*Halilović* Trial Judgment) para. 71; *Blaškić* Appeal Judgment, *supra* note 22, para. 63; *Prosecutor v. Ignace*

responsibility were endorsed by PTC I in Lubanga. In discussing the Elements of war crime of using, conscripting or enlisting children, the Pre-Trial Chamber considered the jurisprudence of the two *ad hoc* Tribunals and concluded that the expression 'had reason to know' is stricter than the one of 'should have known' because the former 'does not criminalize the military superior's lack of due diligence to comply with their duty to be informed of their subordinates' activities.'[184] Rather the 'had reason to know' requirement 'can be met only if military superiors have, at the very minimum, specific information available to them to the need to start an investigation.'[185] Accordingly, 'a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him in notice of offences committed by subordinates.'[186] Thus, one might discern that neglect of a duty to acquire such knowledge, does not feature in the provision of Article 28(1) as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.[187]

In light of the aforementioned, and reading Article 28(a) together with Article 30(3), it appears that while the first alternative of knowledge assigned to the military commander would meet the knowledge standard, the second alternative (should have known) would not. In such a situation the proviso 'unless otherwise provided' will come into play and the second alternative of Article 28(a) 'should have known' would prevail.

Paragraph 2 of Article 28 assigns a recklessness standard (consciously disregard information) with regard to the civilian superiors. This language is akin to the Model Penal Code § 2.02(2)(c). It is observed that the requirement that the actor *consciously disregard* the risk is the most significant part of the definition of recklessness under the Model Penal Code. It is this concept which differentiates a reckless actor from a negligent one.[188] The negligent actor is a person who fails to perceive a risk that he ought to perceive. The reckless actor is a person who perceives

---

Bagilishema, Case No. ICTR-95-1A-A, Judgment 3, 3 July 2002, (*Bagilishema* Appeal Judgment), paras. 34-5.

[184] *Lubanga* Décision sur la confirmation des charges, *supra* note 1, n. 439.

[185] Ibid.

[186] Ibid.

[187] *Blaškić* Appeal Judgment, *supra* note 22, para. 62.

[188] David M. Treiman, *Recklessness and the Model Penal Code*, *supra* note 75, at 351.

or is conscious of the risk but disregards it.[189] Hence, in many offences where the law provides that recklessness is the minimum level of culpability, negligence will not suffice. Accordingly, 'the distinction between 'conscious disregard' and 'failure to perceive' will often signify the difference between conviction and acquittal.'[190]

Article 30 vis-à-vis Mistake of Law and Mistake of Fact

Article 32 of the Rome Statute is the first provision ever in the sphere of international criminal law which expressly recognises mistakes either of fact or law as grounds of excluding criminal responsibility. It is worth noting that the Nuremberg and Tokyo Charters, as well as the Statutes of the two *ad hoc* Tribunals, lack a general provision on the subject.

Paragraph 1 of Article 32 recognises the well-established principle *ignorantia facti excusat*. It provides that 'a mistake of fact shall be ground for excluding criminal responsibility only if it negates the mental element required by the crime.'[191] While the first sentence of the second paragraph of Article 32 reiterates the Latin maxim *ignorantia juris non excusta*, the second sentence of the same paragraph assures 'a mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element …'[192] In his commentary on Article 32 Triffterer had this to say:

> The difference between mistake of fact and *mistake of law* is that *in principle* in the latter case the perpetrator is not mistaken about the existence of a (purely) material element of fact; therefore, mistakes about *legal* aspects of a crime *in general* do not touch the material elements or material prerequisites for justification or excuse.'[193]

On closer inspection, one might consider Article 32(1) to be superfluous as long as the default rule of Article 30(1) of the ICC Statute stands as a safeguard for excluding the criminal responsibility in situations where the material elements of a particular crime are not committed with intent and knowledge. But in situations where the

[189] Ibid.
[190] Ibid.
[191] Rome Statute, Article 32(1).
[192] Rome Statute, Article 32(2).
[193] Otto Triffterer, *Article 32 – Mistake of Fact or Mistake of Law*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 895-914 (Otto Triffterer, ed., 2nd edn., 2008) at 902 (italics in the original).

factual or circumstantial elements of a particular crime are satisfied by a lower threshold than that of intent and knowledge (i.e. negligence) a defence of mistake of fact will not come into play. That is to say that all crimes within the subject matter jurisdiction of the International Criminal Court which in their elements contain the phrase 'should have known' (i.e. Elements of Crimes of article 8(2)(b)(xxvi) and 8(2)(e)(vii)) will stand against the defence of mistake of fact. This might be the reason why Lubanga refrained from claiming error regarding the age of the victim concerned, and instead raised the defence of mistake of law.

The first test of Article 32(2) – mistake of law – was conducted by the PTC I in the Lubanga case. There the Defence argued that Lubanga was unaware that voluntarily or forcibly recruiting children under the age of fifteen years entailed his criminal responsibility under the ICC Statute since the law was not 'accessible' or 'foreseeable' for Lubanga by that time.[194] Schabas noted that 'although the argument was framed as one of retroactivity, it looks more like a claim of ignorance of the law.'[195]

The PTC I observed that 'the scope of a mistake of law within the meaning of Article 32(2) is relatively limited.'[196] The Chamber went further asserting that in the absence of a plea under Article 33 of the ICC Statute, 'the defence of mistake of law can succeed under Article 32 of the Statute only if Thomas Lubanga Dyilo was unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning).'[197] Professor Thomas Weigend disagreed with the PTC I. His fruitful explanation on the subject merits lengthy quotation: 'Normative terms, such as 'conscripting or enlisting', by definition have no 'everyday meaning' that some one could 'realise'. To have the required intent, all the actor needs to understand is what the normative term in question signifies. In *casu*, if Lubanga knew that 'conscripting or enlisting', although referring to a body of military law that he may or may not have been aware of, covers all forms of accepting the military service of young persons, then he knew enough to commit the offence with

[194] *Lubanga Décision sur la confirmation des charges*, *supra* note 1, para. 304. See also Transcript, 26 November 2006.
[195] WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (3rd edn., 2007) at 230.
[196] *Lubanga Décision sur la confirmation des charges*, *supra* note 1, para. 305.
[197] Ibid., paras. 315-316 (footnotes omitted).

intent.'[198] He continued: 'All that Article 32(2) ICC Statute does is to equate the misconception of a normative element (such as 'conscripting or enlisting') of an offence with the misconception of a factual element (such as 'under the age of 15 years').' In either case, Weigend continued, 'the defendant cannot be convicted if he was unaware that his conduct met the definition of the offence, either because he thought that the young recruits were 16 years old (factual mistake) or that he did not 'conscript or enlist' anyone because these technical terms, in his mind, only covered forcible recruitment (normative mistake).[199]

4. CONCLUSION

This study reveals the dominant character of the mental element – Article 30 – within the Statute of the International Criminal Court. Since its integration into the Rome Statute of the International Criminal Court, Article 30 has been subject to different interpretations by legal scholars and commentators. However, one of the major advantages of Article 30 is that it assigns different levels of culpability to each of the material element of the crimes under the subject matter jurisdiction of the Court – element analysis as opposed to offence analysis. Thus, the general rule under this provision is the full coverage of the material elements by the corresponding mental elements.

At present, the only decision rendered by the International Criminal Court on substantive issues, since its creation on 1 July 2002, shed some light on the meaning of intent (dolus) despite some shortcomings.[200] As for the *mens rea* standards under Article 30 of the ICC Statute, the Lubanga PTC I interpreted that provision to include the three categories of *dolus*, namely *dolus directus* of the first and second degrees and *dolus eventualis*.

Our examination also reveals that there are exceptions regarding the application of the default rule of intent and knowledge to the crimes within the *ratione materiae* of the International Criminal Court. The *Lubanga* Pre-Trial Chamber has affirmed that the ICC Elements of Crimes can by themselves "provide otherwise".

[198] Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6 *JICJ* 471 (2008) at 476.
[199] Ibid.
[200] Ibid., 482.

The Chamber considered that the fault element of negligence, as set out in the Elements of Crimes for particular offences, can be an exception to the intent and knowledge standard provided in Article 30(1) of the ICC Statute.[201] In such situations, where conviction depends upon proof that the perpetrator had 'reasonable cause' to believe or suspect some relevant fact, the prosecution has not much to do and the burden of proof, arguably, will lie upon the defendant. Such practice will inevitably infringe one of the most fundamental rights of the accused, namely the presumption of innocence. One might recall paragraph 3 of Article 66 of the ICC Statute which stipulates: 'In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt'[202] Denying such a fundamental principle which is well founded in Islamic law nearly 1400 years ago is considered one step backward for the future of international criminal justice. The Prophet once said: 'eliminate the prescribed punishments whenever it is possible: and if you can manage a dismissal of a Muslim [the accused] do it. It is better for Imam [judge] to be mistaken in pardon than to be mistaken in penalty.'[203] Islamic jurists (scholars) gave this rule a great importance, as it is corresponding to the spirit of the Islamic Shari'a regarding protection of a person from harm and observation of his interest.[204]

At present, *mens rea* or the mental element – the most significant factor in determining criminal responsibility– is still one of the most complex areas of international criminal law, in most part because so many imprecise and vague terms have been used to define this fault element. Suffice to say that in many cases the conviction or acquittal of an accused appearing before the ICC will depend on the interpretation of Article 30 and its relationship with other provisions in the ICC Statute. At present, numerous judgments rendered by national and international courts have paved the way for a better understanding of the complex notion of *mens rea* in the sphere of international criminal law.[205] It is now up to the International Criminal Court to illuminate it.

---

[201] *Lubanga* Décision sur la confirmation des charges, *supra* note 1, paras. 356-359.
[202] According to paragraph 2 of Article 66 'the onus is on the Prosecutor to prove the guilt of the accused.'
[203] Sunan Al Tirmizi, vol. 4, p. 25.
[204] Abd El-Khaleq Ebn Al Mofaddal Ahmaddon, *Qa'edat dar'e al hedood bel-Shobehat wa atharoha fi al fiqh al gena'ei al islami* (The Rule of Eliminating Penalty on Suspicion Criterion and Its Role in Islamic Penal Jurisdiction), 7 CONTEMPORARY JURISPRUDENCE RESEARCH JOURNAL 7-75 (1995), at 9.
[205] See MOHAMED ELEWA BADAR, THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH (Hart Publishing, June 2009).